IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 376.

DUNBAR-STANLEY STUDIOS, INC.,
a Corporation,
Appellant,

versus

STATE OF ALABAMA,
Appellee.

BRIEF

In Opposition to Motion to Dismiss or Affirm on Behalf of Appellant.

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ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

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I.

The Motion to Dismiss or Affirm filed by the State in this case is based solely on the ground that the appeal does not present a substantial federal question, thereby eliminating the other possible grounds for such Motion provided in Rule 16 of this Court. It seems to be conceded that the question decided by the Supreme Court of Alabama in this case is a federal question, and it is not denied that this decision is of significance and substance to the several states in the area of taxation of interstate enterprises. As we read the Motion, the argument advanced for no substance is that the Supreme Court of

Alabama rightly decided the question presented to it. This, of course, we hope to argue extensively on this appeal. But has this Court concluded in any case that a single unitary interstate activity may be fractionalized into parts, and the parts performed within a State be subjected to local licenses?

If so, we have failed to find any such case. **Nippert v. Richmond**, 327 U. S. 416, 423 (1946), says otherwise, as do the other cases cited in the Jurisdictional Statement, page 14:

Nor do any of the cases cited by the State so hold. The fallacy of the holding of the Supreme Court of Alabama, and the position of the State in this Motion, is pointed up on page 15 of the Motion where the State cites the case of **Spector Motor Service v. O'Connor**, 340 U. S. 602, 609, 610 (1951), for the proposition that this Court in that case:

> "* * * recognizes the right of the state to tax local business activities taking place in the state, even though some of the activities connected therewith take place in interstate commerce * * *."

What this Court said in **Spector** was:

> "* * * where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business * * *."

Of course, where a taxpayer, such as a carrier, is engaged in two businesses, one of which is interstate and the other intrastate, the intrastate business may be set apart by the state for local taxation. By far the best statement we have found for this is that by Justice Brandeis in **Sprout v. South Bend**, 277 U. S. 163, 171 (1928), cited on page 18 in the Jurisdictional Statement where he said:

> "But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of

> the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business."

But nothing in these cases, or any others we have found, authorize a state to break up a unitary business transaction into parts, and then pick out the local parts and impose a license tax on them. This, however, is what the Alabama Court did in this case, and the State argues in this Motion that since multi-natured business can be separately taxed, therefore, unitary businesses can be fractionalized for taxing purposes. This we do not recognize to be the law and we know of no authorities which so hold, and **Nippert v. Richmond** says otherwise.

Hence, the breaking up of the photography business into inter and intrastate commerce, and the application of a local license to the intrastate portion of this business, is not in line with decisions of this Court, and such decision is not rightly decided. Since the no substance argument in this Motion is based on the rightfulness of the fractionalization of the photography business, and since such fractionalizing of a unitary business is not rightly decided, there is no basis for the no substance argument.

II.

The State argues several other propositions collateral to its position of no substance to this appeal. Thus, on pages 24-26 in the Motion, it is argued that since the license applied to resident transients as well as non-resident transients, therefore the license was non-discriminatory and it was valid. But the State overlooked completely **Leloup v. Port of Mobile**, 127 U. S. 640 (1888), where the license was on telegraph companies. It was argued that

since it applied equally to companies handling intrastate business as to companies handling interstate messages, it was non-discriminatory and valid. This Court held otherwise. See also the other cases set out on page 19 in the Jurisdictional Statement.

III.

So, the State argues that only the state court may construe a state taxing statute. This is true. But we demur. The state court may not construe a state taxing statute so that it will be unconstitutional. The question here is, did the Alabama Court so construe this photographer's license? If so, as we insist, this appeal should be heard.

IV.

We do not believe that the further arguments by the State against review in this case call for comment from us. The ultimate question in this case is whether or not local businesses can utilize local taxation to prohibit out-of-state competition. Their efforts in this case have been successful so far. We urge this Court to review these cases on their merits, and re-state the constitutional inhibition against such Balkanizing of this Nation.

Respectfully submitted,

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